



Date: April 14, 1999

Case No. 1995-INA-301

In the Matter of:

VONSCHMIDT & FRESHMAN, P.C.

Employer,

on behalf of:

JOANNE PAYNE

Alien.

Certifying Officer: Francis E. Currie
Boston, MA

Appearance: Cynthia R. Exner, Esq.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) issued a Final Determination

¹The following decision is based on the record upon which the CO denied certification, including the Notice of Findings (NOF), rebuttal and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

(FD) denying the application, the Employer requested review pursuant to 20 CFR § 656.26.²

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE PROCEEDINGS

Employer seeks to fill the position within its law firm of Administrative Assistant with a wage offer of \$11.03 per hour, and job duties of:

Aid lawyers in staff capacity by coordinating receptionist, secretaries, paralegals, housekeeping and records control. Studies procedures in order to improve workflow, simplify record-keeping and implement cost reductions. Analyze record keeping and billing procedures, forms, office layout, personnel requirements. Evaluation of workflow, prepares reports, answers and reviews correspondence. (AF 80)

The minimum requirements for the job were listed as two years of experience in the job offered
Other special requirements listed:

Employer will accept 2 years of college level education in lieu of work experience. (AF 80)

The application was denied by the CO on the basis that the employer unlawfully rejected two qualified U.S. workers for the job. (AF 18-19) In the NOF, employer was asked to submit convincing documentation elaborating on the determining factors that were used to conclude why Ms. Kryspin and Ms. Emard were found to be unqualified for the position. (AF 18 & 25) Based on the CO's findings, both applicants possessed at least two years of college level education, along with the requisite "general office experience" given their previous work histories. (AF 18-19)

²Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

CONTENTIONS ON APPEAL

On appeal, employer contends, among other things, that the U.S. applicants cited by the CO as being unlawfully rejected for the job were rejected due to their "unwillingness" to accept the offered position. (AF 1-3) In its Review Request, employer first discusses the rejection of Ms. Kryspin. (AF 2) According to employer, during the interview of Ms. Kryspin, it was apparent to the employer that she was unsure of what type of work she wanted to do. (AF 2) Although Ms. Kryspin possessed a B.S. degree in Criminal Justice and had the requisite experience, employer's main reason for her rejection was due to the applicant's "unwillingness" to accept the position as offered, i.e. full-time permanent. (AF 2) Employer contends that during the interview of Ms. Kryspin, she indicated that ". . . she (Alison) wanted a temporary job to get out of her house and earn some money . . . she did not want full-time permanent employment." (AF 2) In employer's opinion, she didn't have a clue as to what type of work she wanted to do, but whatever type of employment she pursued would only be on a temporary basis until she decided on her career choice. (AF 2) Finally, employer maintains that Ms. Emard turned down the position due to her reluctance to commute 75-80 miles to and from work each day and her desire for accounting work. (AF 2) In addition, employer added that the NOF erred in stating that Ms. Emard was a graduate of Western Connecticut State University.

DISCUSSION

Contrary to the CO in FD conclusions, Emard was not qualified for the job opportunity. The record does not support the FD conclusion that Emard met the requirement of 2 years of general office experience or 2 years of college level education. (AF 19) The NOF had claimed that Emard graduated from Western Connecticut State University. (AF 25) The rebuttal directly contradicted that NOF finding and stated, on the basis of a personal interview:

Dawn did not have 2 years of college. She had taken a few evening courses, in accounting only, at Western Connecticut State University. Even her paralegal studies were well short of the 2 years of college required. (AF 21)

In fact, Emard's resume specified "Evening Accounting Courses" and made no claim of graduation or completion of studies. (AF 43) The FD conclusion with regard to college education is contrary to the record. In support of its conclusion that Emard had 2 years general office experience, the FD speculated that Emard's "computer experience...[with 2 employers] would lead one to believe she has typing skills". (AF 18) However, her resume refers only to use of Lotus 1,2,3 and IBM 36 "in accounting functions" for those 2 employers. (AF 42) Experience in those two accounting programs does not warrant a conclusion of typing skills or computer word processing skills that might reasonably be expected in a law office environment. Indeed, her penned notation to her resume stated that she was "taking computer courses to broaden my background in that field." (AF 43) Employer was entitled to seek an employee who was then qualified and not merely preparing to qualify at some future time. While accounting and

bookkeeping skills might be desirable for a general office worker it does not follow that those skills are equal to the broader skills required of a general office worker. Nor is there any foundation for the FD conclusion with respect to her “managerial experience in a family owned business for ten years leading one to believe that she is capable of performing general office duties”. (AF 19) Penned notes on the resume contain no further indication of the nature of the family owned business (AF 43), which might, for all the record shows, have been a curbside lemonade stand. There was reason for doubt about Emard’s ability and willingness to commute 75-80 miles on a regular basis, including snow in winter months. (AF 22, 38, 61) Further it appears that Emard was interested in accounting, rather than general office work, with her resume having been forwarded at her request to a different employer which might be interested in such an applicant. (AF 2, 3, 61)

As for Kryspin, it is enough to point out that “she did not want full-time permanent employment” and “wanted it to be temporary”, and hence was unwilling, as employer contends, to fill the advertised position. (AF 2, 22)³ The CO did not squarely address this assertion in the FD.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and the alien is herewith ordered **CERTIFIED**.

For the Panel:

JAMES W. LAWSON
Administrative Law Judge

³Although the state agency’s survey form contains Kryspin’s check-in-the box denial that she had been interviewed (AF 67), this was not an issue in the NOF or FD which credited employer’s statements concerning the interview (AF 19, 25, 38, 61), apparently recognizing that Kryspin may have been mistaken in view of the detail provided by employer.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.